Local 150, International Union of Operating Engineers, AFL–CIO *and* Interior Development, Inc. Construction and General Laborers District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO. Case 13–CD–457

September 24, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed April 1, 1992, by Interior Development, Inc. (IDI), a subsidiary of Hawthorn Realty Group, Inc., alleging that the Respondent, Local Union No. 150, International Union of Operating Engineers, AFL–CIO (Local 150), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing IDI to assign certain work to employees it represents rather than to employees represented by Construction and General Laborers District Council of Chicago and Vicinity, affiliated with the Laborers' International Union of North America, AFL–CIO (Laborers Union). The hearing was held April 23 and 27 and May 22, 1992, before Hearing Officer Deborah Schrock.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

IDI is an Illinois corporation engaged in the business of interior construction at its facility in Rolling Meadows, Illinois, where it annually derives gross revenues in excess of $500,000 and annually receives goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. Hawthorn Realty Group, Inc. (Hawthorn) is a Delaware corporation engaged as a real estate developer at its facility in Rosemont, Illinois, where it annually derives gross revenues in excess of $500,000 and annually receives goods and materials valued in excess of $50,000 directly from points outside the State of Illinois. The parties stipulated, and we find, that both IDI and Hawthorn are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that both Local 150 and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

IDI was hired by Wilson Sporting Goods Company to perform the interior construction work at Wilson's new corporate offices in a building located at 8700 West Bryn Mawr Avenue, Chicago, Illinois (Presidents Plaza). Construction on the jobsite, which consisted of work on the 3d, 10th, 11th, and 12th floors totaling approximately 100,000 square feet, began in February 1992[1] with the demolition of the prior tenant's space. IDI used 10 to 12 of its own laborers during the demolition phase, which lasted approximately 4 to 5 weeks. The laborers employed by IDI are covered by a collective-bargaining agreement between the Laborers District Council and Hawthorn, IDI's corporate parent. Hawthorn also furnishes various payroll administrative services to IDI, but all wages and fringe benefit contributions are paid out of IDI funds.

During the demolition phase, the laborers wrecked the existing walls, loaded the debris into portable dumpsters, and removed it from Wilson's four floors by using a freight elevator. The freight elevator is a fully automatic, self-service, pushbutton elevator, which the record indicates was available for the use of all tenants of the building, as well as IDI's construction crews. IDI did not assign any particular employee or group of employees to operate the elevator; instead it was used by IDI's laborers on an as-needed basis, while also being used by the other subcontractors' employees and other building tenants.

On March 12, Local 150 Business Agent Fenton Cross came to IDI's construction office at the Presidents Plaza jobsite and told IDI Project Superintendent Craig Kinzel that IDI was in violation of an agreement by not having a Local 150 elevator operator on site. IDI President Terry Christianson, also in attendance, told Cross that IDI was not a signatory to any agreement. After the meeting, Cross checked at the Union office and found that Local 150 and IDI did not have an existing agreement.

Cross testified that on March 18, he informed Christianson that there was no agreement, and one that would ''put a man on the elevator'' would have to be reached. Christianson testified that he asked Cross to send him a copy of the agreement to which Cross was referring, but Cross refused, telling Christianson that he would have to sign the agreement ''like everyone else did,'' naming two core and shell contractors as examples. Christianson replied that these companies, unlike IDI, employed operating engineers to run heavy equipment and special temporary construction lifts. He told Cross that IDI had been doing the same kind of

[1] All dates refer to 1992 unless otherwise specified.

work for several years in buildings with automatic freight elevators and never had a problem with Local 150.[2] According to Christianson, Cross said that he would strike the Presidents Plaza jobsite.

Cross testified that on March 20, he informed Christianson that Local 150 would be picketing for recognition. On March 24, Local 150 set up a picket line at both entrances of the Presidents Plaza jobsite.[3] The picketing continued through April 3, during which none of the other building trade employees of the subcontractors or IDI's laborers crossed the picket line, and the job was shut down. When the picketing ceased, the tradesmen returned to the job, and they resumed operating the elevator when needed.

Local 150 resumed its picketing on April 8, and continued picketing until April 10. During this picketing, the laborers continued to work, but the other building trade employees refused to cross the picket line.

B. *Work in Dispute*

The disputed work involves the operation of an inside freight elevator at 8700 West Bryn Mawr Avenue, Chicago, Illinois (Presidents Plaza), when it is used in connection with the demolition phase of interior construction.

C. *Contentions of the Parties*

Local 150 contends that no jurisdictional dispute exists and that the notice of hearing should be quashed because there are no competing claims for the work and no proscribed activity took place. Additionally, Local 150 claims that all parties have agreed on a method for voluntary adjustment of the dispute, and that IDI and Hawthorn are joint employers under the Act. Finally, in the event the notice of hearing is not quashed, Local 150 contends the work should be awarded to the employees it represents based on the following factors: collective-bargaining agreement; past employer and industry practice; job impact; skills, training and safety; employer preference and past practice; and economy and efficiency.

IDI and Hawthorn contend that the object of the picketing was to force IDI to assign a Local 150 member to the elevator work, and that there is no voluntary method of resolving the dispute to which all parties are bound. In addition, they contend that the Laborers' asserted disclaimer of interest is ineffective because, inter alia, the laborers operated the elevator on an as-needed basis both before and after the picketing and the Laborers Union never directed the employees represented by it to stop performing the work. Further, IDI and Hawthorn contend that the work should be awarded to employees represented by the Laborers Union based on the following factors: collective-bargaining agreement; employer preference and past practice; area and industry practice; and economy and efficiency of operations.

D. *Applicability of the Statute*

Before the Board may proceed to a determination of dispute under Section 10(k) of the Act, it must be satisfied there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for a voluntary adjustment of the dispute. See *Operating Engineers Local 925 (Bradshaw Industrial Coatings)*, 264 NLRB 962, 964 (1982).

It is not disputed that Local 150 Business Representative Cross, after laying claim to the disputed work being performed by the laborers, told Christianson that IDI needed an elevator operator hired out of Local 150's hiring hall. Christianson also testified that Cross told him that Local 150 would strike the jobsite.

In determining the applicability of the statute, the Board must consider whether an object of the picketing was to force or require the Employer to reassign the work in dispute from employees represented by the Laborers Union to members of Local 150. The fact that one of the Union's objectives may have been recognitional does not control. The establishment of one proscribed objective is sufficient to bring a union's conduct within the statutory language of Section 8(b)(4)(D). *Operating Engineers (All American Decorating Corp.)*, 296 NLRB 933, 935 (1989). *Carpenters Local 593 (T & P Iron Works)*, 266 NLRB 617 (1983).

With regard to the competing claims question, the party raising the issue that a disclaimer eliminates the existence of a jurisdictional dispute (here Local 150) has the burden of proving a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute. *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 939 (1989). Here, the uncontradicted evidence is that the laborers performed the work both before, after, and at times during the picketing. In addition, there is no indication that the Laborers Union business agent at any time directed the laborers to stop performing the work, and the laborers never questioned or rejected the assignment. Under these circumstances, we find that Local 150 failed to carry its burden of establishing the Laborers' clear, unequivocal, and unqualified disclaimer to the work in dispute. *Austin Co.*, supra at 939.

Further, even assuming Local 150 carried its burden of proving an unequivocal disclaimer, such a dis-

[2] Christianson testified that in the past 3 years, IDI has had 80 to 100 interior construction jobs, 65 percent of which involved buildings with freight elevators, and has never had any employee assigned to operate the freight elevators.

[3] There were approximately six pickets carrying signs that read: ''Local 150 on strike against IDI, Interior Development, Inc., for recognition as bargaining representative for company's operating engineer employees.''

claimer involves no sacrifice by the employees represented by Laborers. See *All American Decorating Corp*., supra, 296 NLRB at 935; *Austin Co*., supra, 296 NLRB at 939–940; *Longshoremen ILA Local 1291 (Pocohantas Steamship Co.)*, 152 NLRB 676, 679–680, and 154 NLRB 1785, 1789 (1965), enfd. 368 F.2d 107, 110 (3d Cir. 1966), cert. denied 386 U.S. 1033 (1967). In fact, the disputed work of pushing the self-service elevator's buttons was done on an incidental basis. In such circumstances, it is impossible to allocate part of the laborers' compensation to the disputed work. Absent evidence that the compensation for the disputed work is severable, a disclaimer of such work is not synonymous with a disclaimer of the employee's compensation and the jurisdictional dilemma remains. *Austin Co*., supra, 296 NLRB at 940. Consequently, we find that the Laborers' disclaimer fails to extinguish the jurisdictional dispute.

Local 150 also asserts that all the parties to the dispute are bound by various collective-bargaining agreements to have the dispute adjusted by the Joint Conference Board established by the Standard Agreement of the Construction Employers' Association of Chicago, Inc. and Cook County Building Trades Council (Joint Conference Board Method). Local 150 states that its master Illinois Building Agreement binds IDI, through Hawthorn, to the Joint Conference Board, as does the contract between the Laborers and Hawthorn.[4]

This assertion is premised on the assumption that the Illinois Building Agreement allegedly binding Local 150 and IDI, through Hawthorn, is still in effect. While Hawthorn executed a memorandum of agreement adopting the Illinois Building Agreement in 1988, it is undisputed that Hawthorn clearly and unequivocally repudiated its agreement with Local 150 by letter dated April 25, 1990.[5] The 6-month limitations period of Section 10(b) of the Act bars Local 150 from challenging Hawthorn's repudiation in any proceeding under the Act. *A & L Underground*, 302 NLRB 467 (1991). Therefore, the Illinois Building Agreement cannot form the basis for binding either Hawthorn or IDI.[6]

Likewise, the Laborers' Building Agreement cannot form the basis for binding either Hawthorn or IDI to the Joint Conference Board Method. Article XV, paragraph 4 of the Laborers' Building Agreement states:

> The Standard Agreement formulated by the Joint Conference Board of the Construction Employer's Association and the Chicago and Cook County Building Trades Council, as amended and readopted, shall be and hereby is adopted as part of this Agreement *for the Builders Association of Greater Chicago and its members only*, as fully and completely as if incorporated herein. [Emphasis added.]

It is undisputed that neither IDI nor Hawthorn is, or has ever been, a member of the Builders Association of Chicago, nor have they ever submitted to the Joint Conference Board's jurisdiction in any other proceeding. Further, the Memorandum of Agreement between Hawthorn and the Laborers Union does not discuss the Joint Conference Board or its authority to resolve jurisdictional disputes. Therefore, the Laborers' contract cannot bind Hawthorn or IDI to the Joint Conference Board procedure.

Accordingly, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Therefore, we deny Local 150's motion to quash the hearing and find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute:

1. Certifications and collective-bargaining agreements

As noted above, there is no current agreement with Local 150 which arguably covers the work in dispute. The collective-bargaining agreement between Hawthorn and the Laborers defines in article XV, paragraph 4(b) of that agreement the scope of the laborers' work to include: ''all loading and unloading of materials carried away from the site of wrecking.'' Therefore, to the extent that operating the freight elevator is incidental to that work, the factor of collective-bar-

[4] Local 150 relies on its argument that IDI and Hawthorn are joint employers to reinforce this claim. Because, for the following reasons, we find that neither contract binds IDI to the Joint Conference Board Method, we need not address Local 150's joint employer argument.

[5] Local 150 concurred with the hearing officer's ruling at the hearing that the repudiation would not be litigated in the 10(k) proceeding.

[6] In agreeing with this finding, Member Devaney relies on the undisputed evidence of Hawthorn's April 1990 contract repudiation. He finds the repudiation on this record sufficient to negate a conclusion that Local 150 has established the existence of a binding agreement between Hawthorn and Local 150 at the time of the March-April 1992 events here. Thus, Member Devaney finds it unnecessary to rely on his collegues' discussion of Sec. 10(b) and *A & L Underground*, supra, in which he dissented.

gaining agreements favors an award to the employees represented by the Laborers.

2. Employer preference and past practice

IDI has assigned the disputed work to its laborers on an as-needed basis and prefers to continue this assignment. This is in accord with IDI's past practice at other jobsites. Further, Christianson stated that IDI has had between 80 and 100 different interior construction jobs in the past 3 years, of which 65 percent of the jobs were in buildings with freight elevators. IDI has never hired an operating engineer to run the freight elevator on any of those jobs.[7] Therefore, this factor favors awarding the work to employees represented by the Laborers Union.

3. Area practice

Christianson testified that he has 21 years of experience in the Chicago-area construction industry and stated that it is the area practice for general contractors to have operating engineers operate outside construction elevators and to have tradesmen operate inside freight elevators on an as-needed basis in the same manner as the Presidents Plaza job. He also stated that there has never been a particularly assigned elevator operator for an inside elevator on any of the projects on which he has been.

Local 150's Cross did not testify as to the area practice regarding the operation of inside elevators during interior tenant construction work, instead testifying about Hawthorn's prior use of an elevator operator at the Riverway project. As stated earlier, the Riverway project was still in its core-and-shell construction phase when the operating engineers were used to run the construction elevators. Cross did testify that training would be involved if the freight elevator could be and was operated on a manual or semimanual function, but there was no evidence as to whether this elevator had such a capacity. Thus, the weight of the evidence indicates that the practice in the Chicago area is to allow various tradesmen to operate inside elevators on an as-needed basis. Therefore, this factor favors awarding the work to the employees represented by the Laborers Union.

4. Relative skills

The evidence establishes that the elevator at issue is a fully automated, self-service elevator. Except for some plywood and masonite installed by the laborers to protect the elevator's interior, it is identical in its operation to the building's passenger elevators. The user must push a button to send the elevator to the desired floor. The work in dispute involves even less skill then that required to operate the manual elevators in *Austin Co.*, supra, 296 NLRB at 942. Both groups have the skill to perform the work. Therefore, this factor favors an award to neither the employees represented by the Laborers Union nor to those represented by Local 150.

5. Economy and efficiency

The record establishes that the laborers may use the elevator a maximum of four to five times each day for a few minutes each trip. They perform this work as incidental to other work. Employees can move between the 10th and 12th floors where the construction work is in progress via an interior stairway without using the elevator. The only work available for operating engineers is the operation of the elevator. Thus, it is more efficient to assign the work to employees represented by the Laborers Union.[8]

Conclusions

After considering all the relevant favors, we conclude that IDI's employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, area practice, and economy and efficiency, and to a lesser extent the Employer's collective-bargaining agreement with the Laborers Union.

In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Interior Development, Inc., represented by Construction and General Laborers District Council of Chicago and Vicinity, Laborers' International Union of North America, AFL–CIO are entitled to operate the inside elevator at 8700 West Bryn Mawr Avenue, Chicago, Illinois.

2. International Union of Operating Engineers, Local Union No. 150, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Interior Development, Inc. to assign the disputed work to employees represented by it.

[7] Hawthorn employed an operating engineer to run a freight elevator on one real estate development project, the Riverway Office Plaza, for a 5-month period. However, unlike the Presidents Plaza job, the Riverway project was still in its initial core-and-shell construction phase when an elevator operator was employed there.

[8] While the Operating Engineers argue that job impact favors an assignment to the employees they represent, they only point to the assignment in connection with the Riverway project, discussed above, to support their position. Because that assignment involved exterior work, we find this factor does not support the Operting Engineers' claim for this work.

3. Within 10 days from this date, International Union of Operating Engineers, Local Union No. 150, AFL–CIO shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.